

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re the Matter of)

Complaint of SKY ANGEL U.S., LLC)

Against Discovery Communications,
LLC *et al.* for Violation of the
Commission's Competitive Access
to Cable Programming Rules)

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File No. CSR-8605-P

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ANSWER TO PROGRAM ACCESS COMPLAINT

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ANSWER TO PROGRAM ACCESS COMPLAINT

Discovery Communications, LLC and Animal Planet, LLC (collectively, "Discovery") pursuant to Section 76.1003(e) of the rules of the Commission,^{1/} hereby submit this Answer to the Complaint filed by Sky Angel U.S., LLC ("Sky Angel").^{2/}

INTRODUCTION AND SUMMARY

Sky Angel seeks to paint itself as the injured party here, but the facts are directly to the contrary.

^{1/} 47 C.F.R. § 76.1003(e).

^{2/} *Complaint of SKY ANGEL U.S., LLC Against Discovery Communications, LLC et al. for Violation of the Commission's Competitive Access to Cable Programming Rules*, File No. _____, Program Access Complaint (filed Mar. 24, 2010) ("Complaint") (no FCC file number assigned at the time of filing).

REDACTED FOR PUBLIC INSPECTION

Discovery's termination of the affiliation agreement is a direct result of its discovering that Sky Angel's service does not function in the manner Discovery believed when it entered into the affiliation. Whether Sky Angel deliberately misrepresented the facts to Discovery or not, Sky Angel now seeks to challenge Discovery's termination rights and force Discovery into continuing to allow Sky Angel distribution on terms to which it never agreed. Sky Angel's attempt to avoid the operation of the termination clause is without merit. But in any event, this is a contract dispute and nothing more. Sky Angel's attempt to use the Commission's program access rules as a means of trapping Discovery into a continued affiliation under these circumstances is an egregious abuse of the Commission's time and resources.

Sky Angel's Complaint fails to state a cognizable claim under section 628. Sky Angel offers no evidence that it is an MVPD and freely admits it does not comply with MVPD obligations in its daily operations. The Complaint, which at base is a challenge to Discovery's right to terminate the affiliation agreement, is also time-barred and in any event fails to include the required evidence.

Discovery has not discriminated against Sky Angel; rather in the course of dealing merely treats Sky Angel like every any other distributor of Discovery's networks. And contrary to Sky Angel's unsupported "beliefs," Discovery's programming networks are *not* part of TV

Everywhere and Discovery does *not* give any distributor the rights Sky Angel seeks.^{3/} Nor has Discovery treated Sky Angel unfairly. Discovery was wholly within its rights to exercise a valid termination right under the affiliation agreement.

Finally, the public interest weighs in favor of dismissing the Complaint. The development of new, alternative platforms for delivery and receipt of various programming and services requires an atmosphere that encourages programmers to undertake such experimentation. Discovery was one of the few programmers willing to take a risk and try out Sky Angel's delivery method, and explicitly negotiated the right to terminate the agreement if that methodology proved incompatible with Discovery's business models. This experiment has failed. The Commission should refrain from interfering in this private contractual dispute, or it will risk discouraging programmers and other content providers from taking such risks in the future.

FACTUAL OVERVIEW

In approximately the fall of 2007, representatives of Sky Angel approached Discovery with an idea for a new video offering. They stated Sky Angel was creating a "family friendly" video offering that would include only a few select networks. The offering would be marketed as a limited service that families could use as a supplement to a family's regular MVPD service, if the family wanted, for example, to limit the video content on a "family television set" to networks that were appropriate for all ages. Sky Angel wanted to include some of Discovery's programming networks in this new offering.^{4/}

^{3/} As a courtesy to its distributors, Discovery has occasionally agreed to allow certain pieces of content (*i.e.*, specific programs) to be made available to the distributors' subscribers on the Internet. Declaration of Stephen Kaminski, attached hereto as Exhibit A ("Kaminski Decl.") ¶ 28.

^{4/} Kaminski Decl., ¶ 4.

Discovery wants its content to be as widely available as possible, and uses multiple platforms to achieve this end. It is open to allowing carriage of its programming networks via new technologies and new services, provided that it has the rights to enter into such arrangements.

A. Negotiation of the Sky Angel Agreement.

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Sky Angel emphasized that its service was similar to a traditional cable service, in that it was a fixed service that would be restricted to delivering video content to television sets in subscribers' homes. Neither Mr. Scott nor anyone else at Sky Angel ever mentioned that its service would be marketed as available anywhere there is an Internet connection. Had anyone from Sky Angel ever advised of the transportable, multilocation nature of its service, Discovery would have immediately ceased discussions for distribution of the programming networks.⁷¹

⁷¹

⁸¹

Discovery signed the agreement with Sky Angel on October 16, 2007.

B. Discovery's Concerns About Sky Angel's Distribution System.

Sky Angel carried several of Discovery's programming networks during 2008 and 2009. In late 2009, Discovery became aware that Sky Angel was running a very aggressive marketing campaign that clearly promoted its service as an Internet-based, portable television service that could be used by the same subscriber in multiple locations. Discovery reviewed Sky Angel's

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website and discovered that while Sky Angel's service can be viewed on a television set in the home, it is not a fixed service tied to a single subscriber address but rather can be used by that subscriber at multiple locations because it can be taken to any place with an Internet connection.^{11/}

Sky Angel's current website, <http://www.skyangel.com/home/Default.aspx#>, asserts that Sky Angel is "revolutionary television that can be viewed on your TV or PC." It also states that:

A high-speed Internet connection is required wherever the Sky Angel service is going to be used. The recommended Internet speed is 1.5 Mbps or greater. Sky Angel works with Cable broadband and Telco DSL Internet services only. If you travel with Sky Angel, you must have approved access to the hardwired or wireless Internet and may be subject to usage caps.^{12/}

The Sky Angel website also contains the following question and answer in its

"Frequently Asked Questions" section:

Q: Can I take Sky Angel receiver back and forth to my second home and when I travel?

A: Yes, as long as you have high-speed Internet access at your home and it meets the minimum speed requirement of 1.5 Mbps. When traveling, all you have to do is connect the receiver to a high-speed modem using Ethernet cable or find and use the authorized wireless network. The Sky Angel receiver is small and compact and great for bringing your favorite Sky Angel TV or radio channels along with you while traveling.^{13/}

^{11/} *Id.* ¶¶ 15-17.

^{12/} http://www.skyangel.com/about/faq/general_faq.aspx#/TEXT:splash=f;supportID=192.

^{13/} http://www.skyangel.com/about/faq/general_faq.aspx#/TEXT:splash=f;supportID=204.

^{14/}

C. Discovery's Decision to Terminate Sky Angel.

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Sky Angel's assertion (Collins Decl. ¶ 10) that Discovery suggested it disliked Sky Angel's use of IP technology is absurd. Many of Discovery's distributors use or are planning to use IP technology to deliver the programming networks to their subscribers. Those distributors, however, deliver the networks over a closed, secure system to subscriber homes. They do not make the entire programming network available as part of a portable service that a single subscriber can access from multiple locations in the country over an Internet connection.

Mr. Collins ended the discussion by threatening to mobilize all advocacy groups with whom Sky Angel has contacts in protest against Discovery, a threat to which Discovery did not respond.^{21/} Instead, following these conversations, on January 22, 2010, Discovery sent Sky Angel a letter terminating the agreement. Although not required to do so pursuant to the agreement, Discovery provided Sky Angel with three months' notice in order to allow them sufficient time to notify their subscribers.

D. Discovery's Concerns About Internet Distribution.

Although many of its distributors have expressed an interest in Internet distribution of its networks, Discovery has steadfastly refused to enter into any such agreements.

But in addition, Discovery has determined that at this time, Internet distribution of its programming may not be a sound business plan.^{22/}

^{20/}

^{21/} *Id.* ¶ 32.

^{22/} *Id.* ¶¶ 34-36.

The belief that Internet distribution would not be a strong business model for Discovery is held by all levels of Discovery leadership. Many of Discovery's top executives have been very public about their belief that if Discovery's programming were available over the Internet, the long-term net effect would be a serious decline in Discovery's ability to produce high-quality programming.^{24/}

For all of these reasons, Discovery has not entered into any distribution arrangement with any MVPD or other service provider for distribution of its programming networks on the Internet as part of a transportable, multilocation television service.^{25/}

ARGUMENT

I. SKY ANGEL IS NOT AN "MVPD" ENTITLED TO RELIEF UNDER THE PROGRAM ACCESS RULES

The FCC's program access rules allow a "multichannel video programming distributor" ("MVPD") to file a program access complaint if it believes it has been aggrieved by conduct

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^{24/} *Id.* ¶ 37.

^{25/} *Id.* ¶ 38.

violating the program access rules.^{26/} Sky Angel has failed to establish that it is an MVPD.

Rather, it simply assumes, without demonstrating, that it qualifies under the definition.^{27/}

Sky Angel thus has failed to meet its burden under the rules.^{28/}

The Commission's rules define "MVPD" for program access purposes as "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming."^{29/} Sky Angel does not provide "video programming" and does not "mak[e] available" any programming. As such, Sky Angel is not an MVPD entitled to relief under the program access rules.

A. Sky Angel Does Not Offer "Video Programming."

"Video programming" is "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."^{30/} The video delivered over Sky Angel's service cannot meet this definition.

The Commission has held in an unbroken chain of rulings and commentary that video delivered via the Internet is not "video programming." While early decisions were based on the far lesser quality of Internet video,^{31/} often exempting Internet video offerings from regulations

^{26/} 47 C.F.R. § 1003(a).

^{27/} Complaint at 1 ("Sky Angel is a multichannel video programming distributor").

^{28/} See 47 CFR § 76.1003(a); *Turner Vision Inc. et al. v. Cable News Network*, 13 FCC Rcd 12610, ¶ 14 (1998) (program access complainant has burden of making prima facie showing).

^{29/} 47 C.F.R. § 76.1000(e).

^{30/} 47 U.S.C. § 522(20).

^{31/} See, e.g., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Treatment for Broadband Access to the Internet Over Cable Facilities, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, ¶ 107 n.379 (2001) (stating that "Television-quality Internet video service requires a high-speed broadband connection of about 300 kbps or higher, which most current broadband providers cannot yet guarantee" and noting that "Internet video is also known as 'streaming video,' because data are 'streamed' over the Internet to provide continuous motion video"); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 63 n.236 (2002) ("Streaming video . . . is not consistent with the definition of video

applicable to providers of “video programming,”^{32/} the Commission has continued, despite technological advances in recent years that have improved the quality of Internet delivery,^{33/} to distinguish Internet video from “video programming.” The FCC today routinely considers “web-based Internet video” as different from traditional video.^{34/} Indeed, as recently as last month, the Commission characterized video over Internet as a broadband “application.”^{35/} Pending

programming. Even if streaming video does achieve television quality, it would not be treated as a cable service unless it otherwise falls within the definition of ‘cable service.’”).

^{32/} See *Closed Captioning and Video Description of Programming*, 13 FCC Rcd 3272, ¶ 249 (1997) (omitting reference to Internet-delivered video (“streaming media”) as being “video programming” subject to the closed captioning rules, while noting growth of “video like programming” on the Internet); *Implementation of Section 207 of the Telecommunications Act of 1996: Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings*, 13 FCC Rcd 11248, ¶ 34 (1998) (noting that V-Chip rules are “not intended to apply to computers receiving video transmissions over the Internet or via computer networks.”); *Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, Order on Reconsideration, 13 FCC Rcd 18962, ¶¶ 55, 56 (1998) (rejecting the argument that “video programming includes all information (e.g., information received over the internet) that is commonly viewed on the video screen (including computer monitors).”).

^{33/} In any event, such technological advances would not justify a change in the Commission’s interpretation of the term “video programming” unless the FCC formally acted to change it. *Alaska Prof. Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”); see also *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) (“APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation.”); *Pfaff v. Department of Housing and Urban Development*, 88 F.3d 739, 748 (9th Cir. 1996) (announcements of law by adjudication may not be proper “where the new standard . . . departs radically from the agency’s previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application.”).

^{34/} *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, ¶ 151 (2009) (“13th Video Competition Report”) (noting that “streaming video” is essentially “a technique used for transferring data on the Internet such that it can be sent and received as a steady and continuous stream” whereby the “end-user can connect to the video provider’s server through its web site, and then use streaming software . . . to view the video”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 19 FCC Rcd 10909, ¶¶ 74, 75 (2004) (asking how “currently available real-time Internet video compare to traditional MVPD and broadcast programming”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 14117, ¶ 62 (2005) (seeking comment on “what criteria should be used to compare picture quality of Internet -based video to video programming distributed by traditional broadcasters and MVPDs.”).

^{35/} See CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, at 74 (Mar. 16, 2010).

legislation in Congress also recognizes that the current definition of “video programming” does not include video delivered over the Internet.^{36/}

Sky Angel indisputably uses the Internet to deliver its service.^{37/} Despite its insistence that “Sky Angel does not make video available over the Internet,”^{38/} Sky Angel itself actually characterizes the dispute as one over “who will control access to broadband programming rights”^{39/} and accuses Discovery of attempting to stifle “Internet-based competition.”^{40/} Sky Angel cannot seriously characterize itself as a “broadband,” “Internet-based” service and simultaneously claim it does not offer video over the Internet. Indeed, Sky Angel makes no effort to distinguish its offering from the prior Commission decisions holding that Internet video is not video programming. In fact, as with its claim to be an MVPD, the Complaint states no basis for finding that Sky Angel is offering “video programming” other than to simply assert it as a fact.^{41/} Such an unsupported blanket assertion is not enough to meet Sky Angel’s burden under the program access rules.^{42/}

^{36/} See H.R. 3101, *Twenty-first Century Communications and Video Accessibility Act of 2009* (proposing a new definition of video programming that would include programming that “is distributed over the Internet or by some other means”), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.3101>.

^{37/} Complaint at 1-2.

^{38/} *Complaint of SKY ANGEL U.S., LLC Against Discovery Communications, LLC et al. for Violation of the Commission's Competitive Access to Cable Programming Rules*, File No. _____, Sky Angel Emergency Request for Immediate Grant of Petition (filed Apr. 14, 2010), at 3 (no FCC file number assigned at time of filing).

^{39/} Complaint at 15. The Complaint also argues in places that ensuring access to broadband programming is critical to the Commission’s goals in the National Broadband Plan, *see, e.g., id.* at 13, 15.

^{40/} Complaint at 13.

^{41/} Complaint at 2.

^{42/} *See supra* note 28.

B. Sky Angel Does Not “Make Available” Programming Over MVPD Facilities.

Sky Angel does not “make available” programming in a way that renders it an MVPD under the program access rules. Sky Angel does not own or control, either directly or indirectly, the mode of delivery,^{43/} but rather, delivers its offering using the public Internet and depends on the end subscriber to select a broadband service.^{44/} It has no control over the management, operation or even the selection of the facilities used to deliver its video offerings to end users, or any other aspect of signal delivery.^{45/} As such, Sky Angel cannot be viewed as making video programming services “available” over MVPD facilities. Indeed, the Commission routinely separates and distinguishes between providers of Internet-delivered video and MVPDs.^{46/}

^{43/} In addition, Sky Angel may not be an MVPD because it does not make available “multiple channels” of video programming. The Act defines a “channel” to mean “a portion of the electromagnetic frequency spectrum which is used in a cable system” 47 U.S.C. § 522(4). Sky Angel, however, distributes programming over a broadband connection, which does not use the electromagnetic frequency spectrum at all and cannot be viewed as separable into “channels.”

^{44/} See Sky Angel Support Area, Frequently Asked Questions at http://www.skyangel.com/about/faq/general_faq.aspx#/TEXT;splash=f;supportID=192 (“A high-speed Internet connection is required wherever the Sky Angel service is going to be used.”).

^{45/} Indeed, the Commission’s currently ongoing net neutrality rulemaking is premised on the Commission’s belief that because Internet-delivered video providers (among other content, applications and services) have no control over the manner in which their service is delivered to subscribers, broadband service providers should be more heavily regulated.

^{46/} See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 19 FCC Rcd 10909, ¶¶ 74, 75 (2004) (asking how “currently available real-time Internet video compare to traditional MVPD and broadcast programming”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 14117, ¶ 62 (2005) (seeking comment on “what criteria should be used to compare picture quality of Internet-based video to video programming distributed by traditional broadcasters and MVPDs.”); *The Commission’s Cable Horizontal and Vertical Ownership Limits; Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 23 FCC Rcd 2134, ¶ 44 (2008) (refraining from including “mobile phones, the Internet, home video rentals, or international distribution in . . . total subscriber count[s]” because there “is scant evidence in the record whether and how these alternative outlets affect the viability of a cable programmer. Moreover, many of these alternative outlets operate based upon the existing popularity of the content, which is gained only through widespread distribution via MVPDs” and also noting that “including these types of outlets could result in double-counting or triple-counting the same consumers.”) (emphasis added); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, 24 FCC Rcd 542, Table B-1 (2009) Appendix B (excluding Internet video from list of competing MVPD technologies). Compare *Implementation of Section 304 of the Telecommunications Act of 1996*;

Further, the Commission has specifically characterized the Internet as a “non-MVPD outlet” in appellate advocacy to the D.C. Circuit.^{47/}

Although Sky Angel conveniently asserts that it is an MVPD for purposes of the program access rules, it does not appear to act like an MVPD in other respects. For example, despite the obligation the Commission places on all MVPDs to provide closed captioning on programming that is part of their service,^{48/} Sky Angel’s website states that:

Unfortunately, the Sky Angel service does not recognize the electronic codes used for closed captioning. Sky Angel is looking into enhancements that will allow for this type of feature to be available in the future. As these enhancements become available, Sky Angel will advise their customers and provide more information on how to utilize these features.^{49/}

Because Sky Angel is not an MVPD, it has no cause of action under the Commission’s program access rules.

Accepting Sky Angel’s assertion that it is an MVPD could unleash a flood of regulatory consequences. If Sky Angel qualifies as an MVPD, then any Internet-delivered provider of fee-based video content that can be viewed on television sets could qualify as an MVPD as well. Under the program carriage rules adopted pursuant to Section 616 of the Cable Act, any video programmer could potentially seek to be included as part of such an entity’s fee-based, Internet-

Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment, 18 FCC Rcd 20885, ¶ 57 (2003) (applying copy protection encoding rules “to all MVPDs”) with 47 C.F.R. § 76.1901(b) (specifying that encoding rules “shall not apply to distribution of any content over the Internet”).

^{47/} See *Comcast Corp. v. FCC*, Case No. 08-1114, Brief of the Federal Communications Commission, Jan. 9, 2009, at 39.

^{48/} 47 C.F.R. § 79.1 (specifically defining MVPDs subject to closed captioning obligations by reference to the definition used for program access).

^{49/} http://www.skyangel.com/about/FAQ/question_answer.aspx?name=Programming%20and%20Subscription%20Information&id=4&CatName=Before%20You%20Buy. While Discovery is not able to access the Sky Angel service to verify whether or not it is captioned, it notes that it provides its networks to Sky Angel with the required closed captioning intact. If Sky Angel is not passing through that captioning, that is a separate matter for concern and an additional MVPD violation. See 47 C.F.R. § 79.1(c).

delivered video offering.^{50/} Further, the Commission would have to ascertain how to count Internet-delivered video subscribers for purposes of effective competition proceedings,^{51/} as well as for any horizontal ownership rules it seeks to establish. Internet-based video providers also would have the ability to compel local broadcasters to enter into carriage discussions via the FCC's good faith retransmission consent rules.^{52/} And the Commission would have to revise its prior determination to exempt Internet-delivered video from its copy protection encoding rules,

At a minimum, an issue with such far-reaching regulatory implication should not be resolved in the context of a particularized program access adjudication, but should instead be addressed via a rulemaking.^{53/} Based upon the Commission's current rules and policies, however, there is no basis for treating Sky Angel as an MVPD and its program access claim must therefore be dismissed.

II. SKY ANGEL'S COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS APPLICABLE TO PROGRAM ACCESS DISPUTES

The thrust of Sky Angel's program access complaint is that Discovery's invocation of a broad right of termination afforded to it under the Sky Angel affiliation agreement is both an

^{50/} See 47 U.S.C. § 536; 47 C.F.R. § 76.1300. Indeed, Sky Angel itself potentially could be subject to compelled carriage complaints from programmers that (rightly or wrongly) believe that they should be included as part of a family-friendly, faith-based video offering.

^{51/} 47 C.F.R. § 76.905.

^{52/} See 47 C.F.R. § 76.65(b); *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445, ¶¶ 6, 24 (2000) (a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent, and must participate in negotiations with the intent of reaching an agreement).

^{53/} See, e.g., *Community Tel. of Southern Cal. v. Gottfried*, 459 U.S. 498, 511 (1983) (Rulemaking is "generally a better, fairer and more effective method of implementing a new industrywide policy than is the uneven application of conditions" in individual proceedings); *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 96-97 (D.C. Cir. 1988) (noting the FCC's "repeated[]" position that adjudications are not the appropriate forum for promulgating certain industry-wide rules due to "the inherent constraints of the adjudicatory process"); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion); *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003) ("[A]n administrative agency may not slip by the notice and comment rule-making requirements ... through adjudication.").

unfair practice that contravenes section 76.1001 of the Commission's rules and unlawfully discriminatory in violation of section 76.1002(b).^{54/} In essence, Sky Angel seeks to challenge the validity of the contractual provision that expressly allows Discovery to terminate the agreement at any time should it determine that the "distribution methodology used by or on behalf of" Sky Angel is untenable.^{55/}

As explained above,

The Commission has observed that "public policy requires that we avoid unnecessary regulatory interference regarding contracts entered into by consenting parties."^{56/} Sky Angel's

^{54/} See Complaint at 11.

^{55/} Affiliation agreement, § 12.1.

^{56/} *EchoStar Communications Corporation v. Fox/Liberty Networks LLC*, 13 FCC Rcd. 2184, ¶ 20 (1998) ("*EchoStar v. Fox/Liberty Initial Order*").

attempt to use the program access rules to undo Discovery's exercise of a contractual right agreed to by Sky Angel in October 2007 – and heretofore unchallenged – is barred by the statute of limitations applicable to program access complaints.

. If Sky Angel considered that provision to be “unfair” or “discriminatory” in violation of section 628, it was obliged by the Commission's rules to file a complaint challenging the provision within one year of the signing of the agreement in October 2007.^{57/}

The Commission's one-year limitations requirement establishes “a limited period of time to contest unfair or discriminatory contracts and offers.”^{58/} Upon its expiration, a programmer is insulated from having its exercise of contractual rights subject to further program access review during the term of that contract. As the Commission has observed:

All limitations periods and statutes of limitations are premised upon a recognition that, at some specified point in time, potential defendants should be able to proceed with their affairs without the looming possibility of liability. By adopting a limitations period for program access complaints, the Commission inherently recognized that, *following a reasonable period of time in which to raise allegations of discrimination or unfair practices, the parties to a programming agreement must operate under the terms thereof or negotiate amendments thereto free of the program access specter.*^{59/}

The statute of limitations applicable to the instant proceeding began to run on the date the parties entered into the affiliation agreement that contained the termination provision being

^{57/} 47 C.F.R. § 76.1003(g)(1) (program access complaint must be must be filed within one year of the date on which a programmer “enters into a contract with the complainant”).

^{58/} *EchoStar v. Fox/Liberty Initial Order* ¶ 20. See also *EchoStar Communications Corp. v. Fox/Liberty Networks LLC, Order on Reconsideration*, 14 FCC Rcd 10480, ¶ 7 (1999) (“*EchoStar v. Fox Reconsideration Order*”) (“Section 76.1003(r)(1) [now section 76.1003(g)(1)] establishes a firm period for bringing program access claims once the parties have entered into a contract. The *Order* found that the parties were bound by this limitation period regardless of Fox's subsequent offer. Limited regulatory oversight of the relationship between an MVPD and a vertically integrated programming vendor services the Congressional intent of prohibiting unfair or anticompetitive actions without undue regulatory disruption of the multichannel video programming market.”).

^{59/} *Id.* ¶ 14 (emphasis added).

challenged by Sky Angel, and not on the date on which Discovery exercised its termination rights. Under the Commission's rules, after the affiliation agreement had been in effect for a year Sky Angel was no longer entitled to challenge Discovery's exercise of rights accorded to it by the contract.^{60/} Accordingly, under the Commission's rules and precedents, Sky Angel is barred from challenging as an "unfair" or "discriminatory" practice Discovery's exercise of the right of termination accorded to it by the affiliation agreement.

III. DISCOVERY'S EXERCISE OF ITS TERMINATION RIGHT DOES NOT CONTRAVENE SECTION 628(B) SINCE IT WAS NOT UNFAIR AND DID NOT HAVE THE PURPOSE OR EFFECT OF SIGNIFICANTLY HINDERING SKY ANGEL'S COMPETITIVE VIABILITY

Sky Angel's Complaint fails to establish that Discovery's decision to terminate the affiliation agreement is "unfair." The Commission has made clear that to establish a violation of Section 628(b), a complainant must make two "independent" demonstrations:

First, the Commission must determine that the defendant has engaged in unfair methods of competition or unfair or deceptive acts or practices. If the Commission finds unfair acts or practices, the Commission must determine that the unfair practices had the purpose or effect of hindering significantly or preventing a MVPD from providing satellite cable programming to subscribers or consumers.^{61/}

Sky Angel's complaint fails to satisfy either of the two prongs of the Section 628(b) unfair competition standard.

First, there is nothing "unfair" about

. Courts

have held that where a contract affords one party an open-ended discretionary right, it is not

^{60/} 47 C.F.R. § 76.1003(g)(1).

^{61/} *Dakota Telecom Inc. v. CBS Broadcasting, Inc. d/b/a Midwest SportsChannel and Bresnan Communications*, 14 FCC Rcd. 10500, ¶ 21 (1999) ("Dakota Telecom Order").

unreasonable for that party to exercise that right.^{62/}

This course of action
can hardly be branded “unfair.”

Nor can Discovery’s open-ended termination right be considered to be a “new or additional type of conduct that may emerge as a barrier to competition” that should be branded as unfair or deceptive under Section 628(b).^{64/} To the contrary, granting Sky Cable’s complaint would undermine competition by signaling to programmers that they cannot count on fairly protecting themselves if they are otherwise willing to experiment with new distribution platforms and alternative providers. If programmers cannot rely on the terms of their negotiated contracts being upheld and respected by the FCC, they will simply avoid entering into such contracts altogether. The best means of encouraging new competitive offerings over innovative

^{62/} *G.F. Kelly Trucking, Inc. v. U.S. Xpress Enters.*, 281 Fed. Appx. 855, 859 (11th Cir. 2008) (when a “contract provides one party with the unilateral exercise of discretion, the other party cannot reasonably expect that discretion not to be exercised and ‘[p]erformance of a contract according to its terms cannot be characterized as bad faith’”); *LPP Mortgage Ltd v. J. Gardner & J. Gardner Co.*, 258 Fed. Appx. 103, 104 (9th Cir. 2007) (“when a contract contains a term allowing for the unilateral, unrestricted exercise of discretion by one party, that grant of discretion frames the parties’ reasonable expectations as determined under the terms of their contract”).

^{63/}

^{64/} See *Dakota Telecom*, ¶ 22.

distribution platforms that may emerge is to encourage, not penalize, risk-taking by programmers.

Second, while the Complaint contains a considerable amount of erroneous and unfounded speculation regarding Discovery's decision to exercise its termination right, it offers no evidence that Discovery terminated the agreement for the purpose or effect of "hinder[ing] or harm[ing] the complainant relative to its competitors."^{65/} In fact, as demonstrated above, this decision was not made for the "purpose" of harming Sky Angel relative to its competitors.^{66/} Discovery has made clear that

^{65/} *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, ¶ 41, n.26 (1993) ("First Program Access Order") (finding that a claim of unfair practice must establish that the practice is committed for the purpose or effect of "hinder[ing] or harm[ing] the complainant relative to its competitors.").

^{66/} Sky Angel's assertion that the explanation for Discovery's "stunning change in course," Complaint at 13, is that Discovery's distributors view Sky Angel as a competitive threat must be dismissed. Sky Angel offers a highly targeted niche add-on offering that has attracted only a few thousand subscribers. To the extent there are any "distributors which compete with Sky Angel," in this narrow market, *id.*, they do not distribute Discovery's networks. Discovery's cable affiliates do not compete in the same market, and in any event, would be highly unlikely to view Sky Angel as a competitive threat. Sky Angel, itself, markets its offering as a potential supplement to a customer's existing video service.

Further, Sky Angel's suggestion that Discovery's conduct is propelled by a nefarious motive to suppress competition is untethered from marketplace realities. If Discovery really wanted to suppress Sky Angel, it would never have entered into an agreement with it in the first place. Moreover, if Discovery wanted to conduct itself in order to benefit its affiliated cable owners, it would make far more sense for it to decline affiliation deals with Verizon and AT&T, rather than single out a 15,000 subscriber entity like Sky Angel which poses little if any threat to cable. In fact, however, Discovery was among the first programmers to enter into affiliation agreements with Verizon, AT&T and their respective predecessors, and has entered into hundreds of deals with small telephone companies.

Nor has Sky Angel demonstrated that Discovery's decision to terminate has the "effect" of hindering or harming Sky Angel. The Commission has made clear that program access complaints alleging a violation of Section 628(b) must contain a threshold showing of competitive harm.^{67/} The burden of proof is on Sky Angel to demonstrate a "nexus between the alleged unfair method of competition and its ability to distribute satellite cable programming."^{68/} But the Complaint offers no evidence that Sky Angel has been harmed by the impending loss of the Discovery networks from its channel lineup. Nor does it offer any basis for concluding that the absence of the Discovery channels will cause a meaningful number of subscribers to terminate the Sky Angel service.

If anything, the facts suggest that the loss of the Discovery channels will not in any way affect Sky Angel's ability to continue to market itself as a faith-based programming service. Its website states that "we pride ourselves as being the preeminent deliverer of Christian faith-based

^{67/} 47 U.S.C. §76.1003(c)(7).

^{68/} See *American Cable Company v. Telecable of Columbus*, 11 FCC Rcd 10090, ¶ 61 (1996).